Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

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Jack R. Whitehorn

*Petitioner*

vs.

Hugh C. Turner and Jim Whitehorn,
Co-Executors of the estate of
Angula Wilson Whitehorn Turner

*Respondents*

---

On Petition for a *Writ of Certiorari* to the
United States Court of Appeals for the Sixth Circuit

---

## PETITION FOR *WRIT OF CERTIORARI*

---

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4990

## QUESTIONS PRESENTED FOR REVIEW

1.

Whether Constitutional due process was granted petitioner herein pursuant to the Fifth and Fourteenth Amendments;

2.

Whether the Constitutional Privilege allows Federal Statutes raised as a defense in diversity such as claims based on state law, to govern the effect of the defense;

3.

Whether the Federal Rules of Civil Procedure apply to civil actions removed from state courts to the federal district courts;

4.

Whether said rules have any force of law;

5.

Whether an amended complaint supersedes the original complaint;

**6.**

Whether a United States District Court's opinion, as entered, is valid relating to an amended complaint.

**7.**

Whether the Doctrine of *Res Judicata, Collateral Estoppel* is effective as this Honorable Court applied in *Allen v. McCurry*, 449 U.S. 90 (1980);

**8.**

Whether an amended complaint asserting new claims that differ radically from those in the original complaint must be served in accordance with FRCP 4;

**9.**

Whether jurisdiction over a case passes from a United States District Court To a Court of Appeals, divesting the district court's control of the litigation involved in the appeal;

**10.**

Whether an "Order Granting Default Judgment" with a motion, inter alia, to continue in the clerk's office at the time of the ruling is within the scope of this court's FRCP 55 and is with equity and due process;

**11.**

**Whether due process is served with no notice being served on defendants as required by law, *i.e.*, "Notice of Default."**

## Parties to the Proceeding

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## OPINIONS BELOW

The opinion of the lower courts are shown at the Appendix herein and hereto by reference.

## STATEMENT OF JURISDICTION

Pursuant to 28 § 1259(1), cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By *Writ of Certiorari* granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V and XIV

## STATEMENT OF THE CASE

Petitioner Jack R. Whitehorn prays that a *Writ of Certiorari* issue to review the judgment of the Court of Appeals for the Sixth Circuit, affirming the decisions of the United States District Court for the Western District of Tennessee, Western Division.

The case is far more bizarre than the lower court of appeals describes, *i.e.*, "a family dispute."

The instant petition for *Writ of Certiorari* reflects the laws of due process and Constitutional rights pursuant

to the Fifth and Fourteenth Amendments. Moreover, the petition here is rooted first in the erroneous findings of the trial court procedures and errors pursuant to laws and equity both constitutional and due process as evident by different appellate courts' opinions. Further the appellate court ruled against the court's former finding of law upheld by this Honorable Court, *infra*.

The complaint was filed by an attorney in Tennessee who set out in trial court pleadings that she had initiated the action.

As understood from the said pleadings, she is connected to Covington Tennessee (County Seat) and Tipton County, Tennessee politics. Accordingly, it appears she had petitioner removed as coexecutor from his mother's estate *prima facie* for money (*i.e.*, attorney's fees), *infra*. Said complaint was removed by petitioner's motion to United States District Court (trial court). The trial court did not order the complaint replead. Said state court complaint is "the Original Complaint."

During the course of the proceedings at the trial court level, the Federal Rules of Civil Procedure were almost nonexistent as far as plaintiff is concerned.

There are questions of law wherein different circuit courts of appeals may differ.

Due process and private rights are an extreme matter for this Honorable Court to examine in this instant case.

Does the Federal Rules of Civil Procedure, No. 15, relating to filing of amended complaints include the petitioner?

Does the Sixth Circuit Court of Appeals' opinions in other cases relating to an amended complaint displacing the original complaint apply for this petitioner and the matter herein? Furthermore, If the amended complaint was adjudicated in favor of the petitioner herein by the trial court, is they're anything remaining to do, but issue and order so stating?

After the trial court had adjudicated the amended Complaint, does the doctrine of *res judicata* and *collateral estoppel* apply to the instant case as this Court has determined in other civil actions? Do other proceedings after said adjudications of the amended complaint become moot?

Did the trial court omit due process by issuing an order granting default judgment without notice, even after adjudication of said amended complaint?

Finally, is this petitioner herein entitled to due process and Constitutional protection as set out in the Fifth and Fourteenth Amendments to the United States Constitution?

Is there any reasonable question in this matter why this instant application for *"Writ of Certiorari"* should issue?

## ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The petitioner herein, JACK R. WHITEHORN, respectfully submits that the application for *Writ of Certiorari* has reached the level of the ripeness doctrine.

The United States District Court for the Western District of Tennessee, Western Division (trial court) in this instant case has denied due process of law to petitioner and the United States Court of Appeals for the Sixth Circuit has upheld same, citing certain cases not relevant to the proceedings. The appellate court was "fundamentally mistaken. "Due process of law," as it is manifested in the Fifth and Fourteenth Amendments, demands that law shall not be unreasonable, arbitrary or capricious and substantial in relation to the object being sought. To have the opportunity to be heard, to be aware that a matter is pending aside from all else **"due process" means fundamental fairness and substantial justice**; see *Vaughn v. State*, 3 Tenn. Crim App. 54, 456 SW 2d 879, 883. Moreover, a course of legal proceedings, according to these rules and principles, has been established in our system of jurisprudence for the enforcement and protection of private rights.

Section 1 of the Fourteenth Amendment includes the Equal Protection Clause and provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property **without due process of law;** ***nor deny to any person within its jurisdiction*** **the equal protection of the laws.** United States Constitution Amendment XIV, § 1 (Emphasis added.)

Endeavoring to be as concise as possible, the following facts of the instant matter will allow this Court to issue the requested *"Writ of Certiorari"*:

Decedent **Angula Wilson Whitehorn Turner's** original coexecutors of her estate were petitioner herein, Jack R. Whitehorn, and Plaintiffs/Appellees Hugh C. Turner and Jim Whitehorn.

On or about May 3, 1988, petitioner's mother, the decedent, appointed Jack R. Whitehorn, petitioner herein, as her true and lawful attorney in fact. (This is not contested by opposing parties.) At the request of decedent, Petitioner Jack R. Whitehorn, by and through said power of attorney, conveyed certain real property of decedent with extreme conditions as per petitioner's mother's (the decedent's) instructions in August 1993 (five years after power of attorney was executed).

The attorney of record opposing petitioner, Elizabeth B. Ziarko, Covington, Tennessee, began what is commonly known as "ambulance chasing" after petitioner's mother died. This is fact. She sets out same in affidavits and pleadings filed by her in the trial court. Records will so verify.

Ziarko claims to be (and she may be) judge for city of Covington, Tennessee (a small Tennessee town jurisdiction). Covington Tennessee where decedent resided is the County Seat for Tipton County, Tennessee, located within 40 miles of Memphis, Tennessee where the trial court sits. During the proceedings, Ziarko made the following statement in **letter** to United States District Court Judge Gibbons, trial court judge, dated September 19, 1997. **These are her words!**

> "I am afraid I am used to the informality of Tipton County courts where we have more of a tendency to **sit down and work things out.**" (Emphasis added.)

This is not due process. A review of the "supreme law" of the land as set out in the United States Constitution will so confirm. Ziarko, perhaps by sitting down and working things out, had Petitioner Jack R. Whitehorn removed as a coexecutor of the estate. There appears *prima facie*, that unreasonable acts may have been perpetrated. Ziarko, representing the decedent's estate and acting under color of state law, then sued petitioner herein in the same state court (*i.e.*, Chancery Court of Tipton County at Covington, Tennessee where Ziarko had petitioner herein removed as coexecutor of his mother's estate, decedent's estate), subsequently removed by petitioner to United States District Court. All of these details were brought out in the trial court proceedings. The case was moved to federal court **based on diversity jurisdiction.**

Petitioner Jack R. Whitehorn has not resided in Covington, Tennessee in approximately 42 years. As set out in trial court pleadings, Louis R. Komlose, the purchaser of said real property, has never been to Covington, Tennessee.

Komlose, a party to the action, has since been made whole (as divulged to the courts below) and does not participate herein. There was money borrowed by a corporation of which petitioner is an officer and a stockholder, but not the major stockholder, to purchase said property from Komlose. All was disclosed to the lower courts. Mr. Komlose was made whole, but remains somewhat aggravated with petitioner herein.

## THE FEDERAL RULES OF CIVIL PROCEDURE

FRCP 81(c) sets out that said captioned rules apply to civil actions removed to United States District Courts from state courts and govern procedure thereafter; see *Lee v. City of Beaumont*, 12 F. 3d 933 (9th Cir 1993). Moreover, court rules have the force of law, see *Neil v. Neary*, 278 US 160 (1929).

Without lengthy rhetoric setting out line by line how the appellate court misinterpreted the trial court's action in the instant case, we will now put the meat on the bones that will allow this Honorable Court to issue the petitioned *"Writ of Certiorari."*

It is important that this Court knows that Plaintiff/Appellee Hugh C. Turner, who resided in the

state of Tennessee, died on May 26, 1997, while the case was at trial court level. Jim Whitehorn who resides in the state of Florida was the last and only executor since Ziarko had petitioner herein removed, *supra*. No party in interest lives in the state of Tennessee except, of course, Counsel Ziarko. A Constitutional personal jurisdiction question was brought forward in the motion for change of venue at the trial court level, but was denied. We believe the jurisdictional question is valid in law and was not decided properly. We believe the venue should lie in the state of Nevada.

Plaintiffs/Appellees Hugh C. Turner and Jim Whitehorn, coexecutors (after Ziarko had petitioner herein removed, *supra*) of the estate of Angula Wilson Whitehorn Turner, brought their complaint in state court alleging defendant/petitioner herein conspired to defraud his mother, by and through a valid power of attorney, of her interest in her property **by a contract and deed drawn in the State of Nevada, executed in the State of Nevada, by and between two citizens (the defendants) in the State of Nevada, the said contract setting out specifically that:**

> **"This Agreement shall be construed in accordance with the laws of the State of Nevada. Nothing in this Agreement shall require the commission of any act contrary to law of said state."**

Moreover, the power of attorney sets out clearly that: "I, Angula W. Whitehorn, do hereby appoint, make and constitute **Jack R. Whitehorn of the City of Las Vegas, County of Clark, State of Nevada to be my**

**true and lawful attorney-in-fact."** The default judgment, *infra,* was based on said contract and the court rescinded the contract.

## THE AMENDED COMPLAINT AND SERVICE THEREOF

There are questions of law wherein **different federal circuit courts of appeals may differ.** Accordingly, this petitioner's "due process" for the enforcement and protection of private rights was presumed by the trial court and this is not "due process of law."

On or about December 31, 1997, petitioner herein (with Defendant Komlose at that time) filed with the trial court a motion for judgment as a matter of law, FRCP 56, summary judgment.

The fly in the buttermilk now appears:

Plaintiff, upon motion to the trial court, filed an "Amended Complaint" and the trial court then granted said motion as filed. Said amended complaint was filed on April 22, 1998.

The record will show the following facts have been placed before the trial court and the appellate court for Constitutional relief, but to no avail.

Plaintiff/Appellee, as argued in pleadings before both courts, did not file said "Amended Complaint" in the trial court setting forth any Federal Rules of Civil

Procedures under which the amendment was filed. However, after searching the material we have located an Affidavit of Elizabeth B. Ziarko attached to a Memoranda of Facts and Law. In the affidavit, counsel states: "This motion is filed pursuant to Rule 15." **Rule 15 period**, the Court will have to assume what was meant. Now we have something to hang our hats on, not much, but something.

Rule 15(c) permits an amended pleading to relate back to the date of the original pleading by (1) when the statute of limitations governing the cause of action prevents relation back. In this action the statute of limitations had run the one year; see *Teeters v. Currey* 518 S.W. 2d 512, 517 (Tenn. 1974). On or about January 10, 1997, plaintiff/appellee filed the original complaint in state court. On or about February 11, 1997, petitioner filed a motion to move said case to the United States District Court. The amended complaint was filed on or about April 22, 1998.

In 1996, the Eleventh Circuit in *Alicia Caban-Wheeler v. William Elsea*, 71 F. 3d 837, 841 held:

> "However, under Rule 15 of the Federal Rules of Civil Procedure, the decision whether to allow a plaintiff to amend the complaint is separate from, and based upon a different standard, than the decision whether the new claim relates back to the original complaint."

## THE TRIAL COURT ADJUDICATED THE AMENDED COMPLAINT

**The amended complaint filed on or about April 22, 1998 was judicially determined by the trial court on August 5, 1998 and entered August 5, 1998.** Wherein "Order Denying Defendants' Motion for Summary Judgment," the trial court set out:

> "As a preliminary matter, the court rejects plaintiffs' theory that defendants did not execute the deed until after the decedent's death. The court recognized that in Tennessee the power of attorney terminates with the death of the principal. See 20 Juk., Power, § 8 (citing *Wilburn v. Spofford, Titleston & Co.*, 36 Tenn. (4s I) 69 (1857)). The court, however, finds that the execution of the transfer of property to Defendant Komlose occurred on the date that the parties entered into the contract, not the date that Komlose recorded the deed. See *Woods v. Bonner*, 18 S.W. 67, 68 (1890). . . . Thus, the execution occurred on August 23, 1993 before the decedent's death and during Defendant Jack Whitehorn's power of attorney. Accordingly, the court holds as a matter of law that Defendant Jack Whitehorn possessed a valid power of attorney in the time of the deed's execution."

**The amended complaint was judicially determined by the trial court on August 5, 1998 in favor of petitioner herein.**

If the amended complaint is appropriate under Rule 15(a) and displaces the earlier pleading which was filed in state court, subsequently moved to United States District Court, to which it is directed, the trial court erred and deprived petitioner herein of his due process by continuing the case after said adjudication. The case has been resolved in petitioner's favor.

In *Grubbs v. Smith* (which is still good law), 86 F. 2d 275 (6 Cir.) cert. den. 300 U.S. § 658, 57 S. Ct. 437, 81 L. Ed. 867, the same appellate court below in this case held in *Grubbs*: "Plaintiff to combine his petition and amend petition in one amended and substituted petition, and by reference, incorporates all of the exhibits theretofore filed in the action with the petition and the amended petition the same as if copied in full in the amended and substituted petition. But whatever the plaintiff's intention, as a matter of law the amended and substituted petition superseded the prior pleadings in the case." Citing *Ferguson, Ex'r v. Meredith*, 1 Wall (68 U.S.) 25, 17 L. Ed. 604; *Brown Sheet Iron, etc. Co. v. Maple Leaf, etc. Co.*, (C.C.A.8) 68 F. (2d) 787; *Aetna Life Ins. Co. v. Phillips*, (CCA 10) 69 F. (2d) 901; *Bedell v. Baltimore & O.R. Co.*, (D.C.E.D. Ohio) 245 F. 788.

Further, *Louy v. Rhay*, 375 F. 2d 55 (9th Cir. 1967) holds:

> "A complaint that has been amended pursuant to Fed. R. Civ. P. 15(a) supersedes the pleadings it modifies, rendering the original pleading void; *Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and*

> *Procedures,* 1476 at 554-557 (2nd ed. 1990). Moreover, the complaint that has been amended pursuant to the rule governing motion to amend suspends pleadings it nullifies rendering original pleading void. A United States District Court in 1995 citing *Louy v. Rhay,* (9th Cir.) held: "A complaint that has been amended pursuant to FRCP 15(a) supersedes the pleading it modifies, rendering the original pleading void"; see *Datastorm Technologies, Inc. v. Excalibur Communications, Inc.,* N.D. Cal. (1995) 888 F. Supp. 112."

The trial court allowed said amended complaint even with no proper service pursuant to FRCP 5 and FRCP 4. Due process again deprived

The amended complaint differed drastically from the original complaint, asserting new or additional claims, requiring service pursuant to FRCP 4. Plaintiff/Appellee at no time has refuted the amended complaint did not **differ radically from the original complaint** and must be served in accordance with FRCP 4; see *Beckham v. Grand Affair of North Carolina, Inc.,* 671 F. Supp. 415 (W.D. N.C. 1987). However, the trial court's ruling on the amended complaint in this petitioner's favor is a final judgment and the case is over. Because, if a party filing an amendment wishes to preserve **some portion of the original pleading,** the party should incorporate those portions by **specific reference** in the amended pleading. This was not done

in this instant case. See *King v. Dogan*, 31 F. 3d 344, 346 (5th Cir. 1994). The court held:

> "An amended complaint supercedes the original complaint and renders it of no legal effect **unless the amended complaint specifically refers to an adopts or incorporates by reference the earlier pleading.**" (Emphasis added.)

A reading of the "Amended Complaint" clearly shows the Fifth, Sixth and Ninth Circuit Courts of Appeals' judgment is not present in said amended complaint - or if this Court allows the Sixth Circuit opinion as stated now to stand, then there are different opinion of the Fifth, Sixth and Ninth Circuits.

Amended Complaint

"Comes now your Plaintiff by and through his attorney and would amend the Complaint filed in the cause by respectfully adding to the Complaint the following allegations:

1. Plaintiff alleges that the "Contract for Conveyance and Quitclaim Deed to Indemnify" executed by Defendants was not executed on the 23rd day of August, 1993 as the document shows on its face, but rather was executed some time after September 12, 1996, the date of death of Angula Wilson Whitehorn Turner.

2. Plaintiff further alleges that the power of attorney the decedent, Angula Wilson Whitehorn

Turner, executed May 3, 1988, was, after the death of the decedent, of no further legal effect and, therefore, could no longer be used by Defendant, Jack R. Whitehorn, to convey assets of Angula Wilson Whitehorn Turner.

WHEREFORE, PLAINTIFF PRAYS that the relief as prayed for in the original Complaint be granted and further Plaintiff waives a hearing by jury.

Respectfully Submitted
Elizabeth B. Ziarko
Attorney for Plaintiff
P.O. Box 765
Covington, TN 38019
(901) 476-3973"

To help this *pro se* petitioner to be correctly informed, *Black's Law Dictionary*, Sixth Edition, defines the following:

Specifically: "In a specific manner, explicitly, particularly, definitely."

Incorporation by Reference: "The method of making one document of any kind become a part of another separate document by referring to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein. If the one document is copied at length in the other, it is called actual incorporation."

The appellate court below has used this case, *i.e., King v. Dogan*, and asserts: "That the amended complaint refers to the earlier pleading and adopts it by reference." If this Court reads the amended complaint in the same fashion, then the Sixth Circuit, the appellate court below is in direct conflict with its own rulings, *i.e., Grubbs v. Smith* and the Ninth Circuit's case law.

The case law below is correct and relates directly to the instant case including this Court's ruling, *i.e., Washer v. Bullit County.*

In *Davis v. TXO Production Corp.*, 929 F. 2d 1515 (10th Cir. 1991): "It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect"; see *Washer v. Bullit County,* 110 U.S. 558, 562, 4 S.Ct. 249, 250, 28 L.Ed. 249 (1884); *International Controls Corp. v. Vesco,* 556 F. 2d 665 (2d Cir. 1997), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed. 2d 758 1978; *Varnes v. Local 91, Glass Bottle Blowers Ass'n,* 674 F. 2d 1365, 1370 n. 6 (11th Cir. 1982); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F. 2d 594, 601 (5th Cir. 1981); 3 J. *Moore, Moore's Federal Practice,* ¶ 15.08[7] (2d ed. 1990) such a rule establishes to which complaint opposing parties should direct any subsequent motion; 6 C. *Wright, A. Miller & M. Kane Federal Practice and Procedure,* ¶ 1476 at 556-57 (2d ed. 1990); FRCP 15(a).

Moreover, the Appeals Court below in this instant case had previously ruled: "But whatever the plaintiff's intention **as a matter of law,** the amended and substituted petition superseded the prior pleading in the case" (emphasis added); *Grubbs v. Smith,* 86 F. 2d (6th Cir.) cert denied 300 U.S. § 658, 57 S.Ct. 437 81, Ed.

867; citing *Ferguson Ex'r v. Meredith*, 1 Wall (68) 25, 17 L.Ed. 604; *Brown Sheet Iron etc. Co. v. Maple Leaf Co.*, (CA 8) 68 F. 2d.; *Bedell v. Baltimore & O.R. Co.*, (D.C. E.D. Ohio) 245 F. 788.

There is unlimited case law setting out the laws as shown hereinabove. Accordingly, by proper "due process" the matter is concluded by the trial court's ruling as entered on August 5, 1998 and ended the case. The petitioner herein has a judgment in his favor.

A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment; *Catlin v. United States*, 324 U.S. 229, 233 (1945).

## THE DOCTRINE OF *RES JUDICATA*

The appeals court below has ruled:

> "It is well established, under the doctrine of *collateral estoppel*, that once an issue of fact has been actually litigated and necessarily determined by a court of competent jurisdiction, the resolution of the issue is conclusive to a subsequent suit involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979; *Kaufman v. Seidman*, 984 F. 2d 182, 184 (6th Cir. 1993)."

The *Restatement* (second) *of Judgments* states that "[f]ederal law determines the effects under the rules of *res judicata* of a judgment of a federal court, making no

distinction between a federal judgment based on federal question or diversity jurisdiction; *Restatement* (second) of *Judgments* § 87 (1982).

*"Res judicata"* is a term traditionally used to describe two discreet effects: (1) what we now call claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it); and (2) issue preclusion, long called *"collateral estoppel"* (an issue of fact or law actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim); see *Migra v. Warren City School Dist. Bd.*, 465 U.S. 75, 77 n.1 (1984).

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court held:

> "The federal courts have traditionally adhered to the related doctrines of *res judicata* and *collateral estoppel*. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac*, 94 U.S. 351, 352. Under *collateral estoppel*, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153.5 As this Court and other courts have often recognized, *res judicata* and *collateral estoppel* relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources,

and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153-154.

In recent years, this Court has reaffirmed the benefits of *collateral estoppel* in particular, finding the policies underlying it to apply in contexts not formerly recognized at common law. Thus, the Court has eliminated the requirement of mutuality in applying *collateral estoppel* to bar relitigation [*Montana v. United States*, 440 U.S. 147, 153 of issues decided earlier in federal-court suits, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, and has allowed a litigant who was not a party to a federal case to use collateral estoppel 'offensively' in a new federal suit against the party who lost on the decided issue in the first case, *Parklane Hosiery Co. v. Shore*, 439. U.S. 322.6 But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity" to litigate that issue in the earlier case. *Montana v. United States, supra*, at 153; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra*, at 328-329.7"

## TRIAL COURT PROCEEDINGS AFTER JUDGMENT MOOT

On August 5, 1998, the same day the case was concluded, *supra*, petitioner herein filed with the trial court (not having been notified of the court ruling) a motion captioned "Proposed Pretrial Order and Motions to Dismiss Amended Complaint and for Adjudication on Defendants' 'Motion for a Judgment as a Matter of Law, FRCP 56' Filed December 31, 1997 **or in the Alternative** to Dismiss the Case in Its Entirety and for Court to Vacate Trial Date Set for August 17, 1998."

This motion should have been ruled moot pursuant to the case conclusion. "Under Article III of the Constitution, federal courts may adjudicate only actual ongoing cases or controversies. However, this instant case was continued.

To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed, *e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401.

**The case is now over**, but here, the trial court does not recognize its own adjudication.

**The Case continues** and petitioner/appellant herein tries to defend. The trial date was set for August 17, 1998. The trial court denied what the court called the "August 5 filings." An appeal was filed with the Sixth Circuit. Petitioner here, in good faith, knew the case was over and examined this Court's ruling in

*Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed. 2d 225 (1982), noting that notice of appeal is an event of jurisdictional significance, conferring jurisdiction on the court of appeals and divesting the district court of control over those aspects of the litigation involved in the appeal.

No hearing. **The trial court with its own order rescheduled the trial date from August 17, 1998 until October 26, 1998 after other trial date settings**, *infra.*

This petitioner had never asked for a continuance, but dismissal and an order because the case was over. Appellants filed a "Motion for Stay of Proceedings Pending Appeal" with the trial court on or about October 2, 1998. The trial date was approaching and Petitioner/Appellant Whitehorn telephoned the court case manager to determine if the motion had been misplaced, lost, etc. because the motion had not been adjudicated. The case manager advised petitioner that she would look into the matter and call Petitioner Whitehorn back.

On or about October 22, 1998, the case manager called and advised the judge said, "The motion for stay was denied and an order would be entered that day." The case manager also advised that the trial would be held on October 26, 1998.

With only three to four days to travel 1500 miles to appear at a trial wherein the court had

1. No jurisdiction on the matter on appeal;

2. The case was over, the court had already adjudicated the matter;

3. Defendant Komlose was ill; and

4. It was physically next to impossible to appear.

Accordingly, Appellant/Defendant Whitehorn filed a motion to vacate the trial pending appeal (by overnight carrier). The trial court does not by local rule accept pleadings by facsimile. The motion was denied as filed untimely. The court set out "Said motion was filed about the time the hearing was concluded." The trial court has rendered an "ORDER GRANTING DEFAULT JUDGMENT."

## ORDER GRANTING DEFAULT JUDGMENT

The original trial date was set to accommodate Ziarko's vacation plans. Petitioner/Appellant agreed. Trial date set for August 17, 1998, entered on December 12, 1997. The trial court reset the trial date set for August 17, 1998 to possibly week of September 8, 1998. This turn of events was entered on August 11, 1998, a very erratic trial date. On August 13, 1998, a setting letter was entered that trial would be reset for August 8, 1998 at 9:30.

On August 3, 1998, a setting letter was issued by the court resetting the trial date from August 8, 1998 to October 26, 1998 at 9:30 a.m. – again a change in trial date.

The trial court still was setting fluctuating trial dates and the court has already adjudicated the matter, *supra.*

On or about October 22, 1998, defendant/ appellant's motion for stay of proceedings pending appeal was denied by telephone with petitioner herein by petitioner herein initiating contact with the case manager. The record will clearly show that the court was well aware that Mr. Komlose was 70 years of age and not in good health and petitioner herein is a verified totally disabled individual. With the inconsistency of the trial court in a setting trial date, the case already having been adjudicated, etc., appellants/defendants filed an overnight motion to vacate with the trial court. In the minutes of the docket of the case, the trial court set out the motion untimely, was not filed until after the trial began.

The trial court, in the transcript furnished by Ziarko, sets out that "Mr. Komlose was ill."

The court further stated in transcript of their hearing:

> "My position about this is that at a minimum, the defendants have an obligation to appear this morning and either in writing or orally make whatever motion they had to make with respect to continuing the matter."

**The motion in writing was in the clerk of the court's hands.**

The petitioner/appellant did not even receive his due process, *i.e.*:

> "Where the defendant has "appeared," in which case the court must serve the appealing defendant with written notice of the application for default judgment at least three days before any hearing on the application; see *Canal Insurance Company v. Dale Ashmore*, 61, F. 3d 15 (8th Cir. 1995). (Abuse of discretion to fail to set aside default judgment where defendant never received notice); *D.B. v. Bloom*, 896 F. Supp. 166. (D.N.J. 1995), court must be satisfied that party received notice of motion."

The Ninth Circuit has said:

> "A failure to satisfy the notice requirement specified in Rule 55(b)(2) is considered a serious procedural error that usually justifies reversal on appeal of setting aside of a default; see *Wilson v. Moore & Associates, Inc.*, 364 F 2d 366, 369 (9th Cir. 1977).

This petitioner has never received "Notice." The lower appellate court's analogy reflects that petitioner/appellant made no appearance. To the contrary, we have defended and appeared most diligently. Moreover, judgments by default are disfavored and are never granted as a matter of right; see *Patray v. Northwest Publishing, Inc.*, 931 F. Supp. 865, 868 (S.D. Ga. 1996); see *Enron Oil Corp. v. Diakuhara*, 10 F. 3d 90, 95-96 (2d Cir. 1993); *United States on Behalf of and for Use of Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d

128, 130 (8th Cir. 1993). Thus, defaults are extreme sanctions; see *D.B. v. Bloom*, 896 F. Supp. 166 (D.N.J. 1995). Moreover, "A weapon of last and not final resort"; see *Martin v. Coughin*, 895 F. Supp. 39 (N.D. N.Y. 1995). Doubts are resolved in favor of lifting the default; see *Enron Oil Corp. v. Diakuhara*, 10 F. 3d 90, 96 (2d Cir. 1993); *Canfield v. VSH Restaurant Corp.*, 162 FRD 431 (N.D. N.Y.1995); *Hodges v. Jones*, 873 F. Supp. 737, 742 (N.D. N.Y. 1995).

The trial court was so determined to expedite the instant case without "due process." The transcript of the court hearing states:

> "If you would draft the order, Ms. Ziarko and get it in. It would be great if you could do it this week **so I could have this case off my books before the end of the month.**" (Emphasis added.)

No notice, no due process. Moreover, the case had been adjudicated.

## CONCLUSION

This matter is of such imperative public importance and compelling reasons. Even the trial court docket minutes at Docket No. 89 reflects the court's doubt as to what it has done in "Order Granting Default Judgment." The court states: "There is thus a strong showing that dfts are likely to **succeed on the merits of their appeal.**" Inter alia, there is conflict of other United States Courts of Appeals on the same basic matter, The Writ of Certiorari should be issued

forthwith . Further, the petitioner/appellant herein, as explained supra, has been denied the concept of "due process of law" as is embodied in the Fifth and Fourteenth Amendments of the Constitution of the United States - simply, **fundamental fairness and substantial justice.**

Petitioner/Appellant herein, Jack R. Whitehorn, prays that this Honorable Court issue a Writ of Certiorari pursuant to anguish herein and the due process and Constitutional rights of this citizen petitioner of the United States of America.

Respectfully submitted this 24th day of July 2000.

Jack R. Whitehorn
Appellant *pro se*